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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

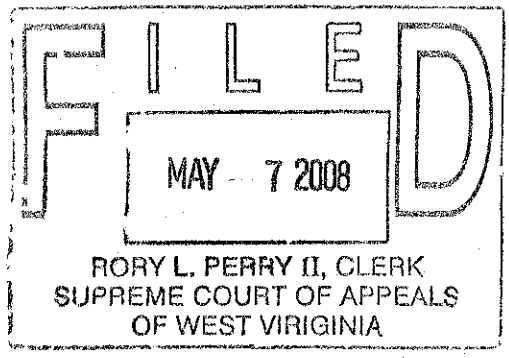
CONTRACTOR ENTERPRISE, INC.,
a West Virginia corporation,

Appellant,

v. No. 072814

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Appellee.



RESPONSE OF APPELLEE, WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS TO BRIEF *AMICUS CURIAE*

Anthony G. Halkias (WVSB No. 1535)
Robert B. Paul (WVSB No. 6361)
WVDOT, Division of Highways
1900 Kanawha Blvd., East
Building 5, Room A-519
Charleston, WV 25305-0430
(304) 558-2823

Counsel for Appellee West Virginia Department of Transportation, Division of Highways

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STATEMENT OF FACTS

The facts not adequately considered by the Amicus, Contractors Association of West Virginia (hereinafter "CAWV"), mirror those absent from the Appellant's Brief. As noted in the Order at issue in this appeal, the underlying action is an eminent domain proceeding taking certain property owned by the Appellant, Contractor Enterprise, Inc. (hereinafter "CEI"), for use in the construction of a portion of W.Va. Route 10 in Logan County. This public road construction project (hereinafter, the "Project"), was originally advertised for bidding purposes in 2006. The lowest bid, from Heeter Construction, Inc., totaled $21,773,608.89. (2-12-07 Hearing tr. at 29-30; Defendant's Exhibit 10 at 001-1). The Engineer's Estimate, the estimated cost of the Project, as developed by the Engineering Division of the Division of Highways (hereinafter "DOH") was $14,004,453.80. (2-12-07 Hearing tr. at 46; Defendant's Exhibit 10 at 001-1). Utilizing the standards set forth in a document entitled the "DD-711 Guidance for Evaluation of Contractor's Bids" (2-12-07 Hearing tr. at 22-25; Plaintiff's Exhibit A) (hereinafter "DD-711"), the DOH determined that the bidding process was not competitive pursuant to the standard set forth in Section 30.1 of the DD-711. Thereafter, in accordance with the provisions of Section 40.1 of the DD-711, the Engineer's Estimate was examined in detail and revised, to determine if the Project could be awarded to the low bidder despite the fact that the low bid was significantly higher than the Engineer's Estimate. (2-12-07 Hearing tr. at 48-49). However, the revised Engineer's Estimate was $16,857,039.80, a figure well below the lowest bid. (2-12-07 Hearing tr. at 49). Upon reviewing the bidding process and further analyzing the characteristics of the Project, the DOH determined that the bids should be refused, and the Project rebid. (2-12-07 Hearing tr. at 76-78). Ultimately the DOH concluded that the bidding process and the Project's

cost were unusually dependent upon the availability of an adequate waste site (2-12-07 Hearing tr. at 6-7, 63-65), and that the property best suited for use as a waste site to serve the Project was the property owned by CEI. (2-12-07 Hearing tr. at 7-14, 64-65).

The citations above to portions of the record refer primarily to the hearing testimony of Greg Bailey, the Director of the Engineering Division of the DOH (2-12-07 Hearing tr. at 5-6), and it should be noted that Mr. Bailey's testimony presents the reasoning of the DOH in determining that a waste material site should be acquired to serve the public road project at issue, as well as the determination that the property at issue is the best choice for such a site. Mr. Bailey's testimony also shows that the DOH followed the appropriate process in analyzing the Project bids and that the federal agencies involved with the project concurred with the actions of the DOH, including the designation of the property at issue as a potential, rather than a mandatory, waste site. (2-12-07 Hearing tr. at 74-75).

Although, as stated by the Appellant, the DOH routinely utilizes a publication entitled "Standard Specifications Roads and Bridges" (the "Standard Specifications Book"), the actual language of the section at issue flatly contradicts the Appellant's argument. As quoted by the Appellant itself (Appellant's Brief at 6, citation to Exhibit 5), Section 207.6.3 of the Standard Specifications reads, in pertinent part, as follows: "The Contractor shall locate and furnish all sites for the disposition of waste and surplus material, **except those sites shown on the Plans.**" (Standard Specifications at 111, emphasis added). The waste site at issue falls within the exception as a site shown on the Project plans.

Finally, Mr. Bailey also testified in rebuttal to the testimony of Mr. VanKirk, noting that in various road construction projects, the DOH had designated potential or mandatory waste sites

and borrow sites, rather than leave these matters solely to the contractor. (2-12-07 Hearing tr. at 16-22). The DOH believes that the facts noted above are needed in order to fully evaluate the arguments of the Amicus.

DISCUSSION

In Section II of the Amicus Brief, entitled "Factual Background", without significant comment, the CAWV states that, at the time of the initial bidding for the Route 10 project, "**the DOH**, because the low bid [made by Heeter Construction] was well above its estimate for the project, **pursuant to its procedures and formulas in place and in accord with its discretion to do so, refused all bids.**" (Amicus Brief at 1 (unnumbered page), Section II (emphasis added)). Thus, the CAWV agrees, or at least effectively admits, that the DOH had the discretion to rebid the project in an effort to ensure competitive bidding and the most efficient expenditure of public funds.

The DOH has repeatedly stated, both formally in the underlying action and informally, that it has attempted, in this case, to use its statutory authority in an effort to remedy a specific problem relating to the Route 10 project at issue. The position of the CAWV, as presented in Section III of the Amicus Brief, is a discussion of general policy relating to waste sites for public road projects. There is no reference to, or citation of, any legal authority that would prohibit the condemnation now at issue. As to a general policy, the DOH has never disputed that the taking of property for waste sites by the DOH is not common practice. The DOH has never disputed that there are good reasons supporting the general practice of allowing a contractor to identify and acquire waste sites. However, despite the CAWV's apparent understanding of the basis for the actions of the DOH in this particular case, i.e., the refusal of the initial bids, in accordance

with existing procedures and agency discretion, due to the disparity in the bids and the significant difference between the low bid and the DOH estimate, the CAWV discusses generalizations as if the facts were meaningless.

The statement that "entrepreneurship . . . is to be encouraged" (Amicus Brief at 5 (unnumbered page), Section III) is, under the facts and circumstances of this case, both trivially true and misleading. The use of the term suggests a fair competition among contractors, and the CAWV specifically uses the terms "entrepreneurship" and "competition" in conjunction, as if each inevitably reinforces the other. To the contrary, the results of the initial bidding were analyzed, as noted by the CAWV, "pursuant to [DOH] procedures and formulas in place" at the time (Amicus Brief at 1, Section II), and the analysis did not show competitive bidding. As the CAWV must know, but fails to mention, the competitive bidding process is required by W. Va. Code § 17-4-19, and is intended to result in the lowest reasonable cost to the people of the State.

The statute that requires competitive bidding is itself mute testimony to the fact that the interest of the public and the interest of the CAWV's members are not identical. When, upon analysis, the DOH concluded that the unique characteristics of the project and its location had nullified the basic purpose of the competitive bidding process, it chose to alter the project plans in a manner that would render the bidding process competitive and fair, so that the purpose of the process would be achieved. In short, faced with an unusual situation, the DOH utilized its statutory authority in order to effectuate the clear public policy of the State of West Virginia.

Where bidding does not appear to have been competitive, and, as the CAWV admits, the low bid was "well above" the DOH estimate for the cost of the project, it is reasonable to consider that the "entrepreneurship" of the low bidder was so effective that it eliminated the competition. Thus, the acquisition of property that the DOH believed, and continues to believe,

represents the optimum location for a waste site serving the public road project at issue, was intended to ensure competitive bidding, and to promote the exact "fundamental fairness" between and among potential bidders that the CAWV values so highly. There is evidence of record that the original bidding process was flawed, not competitive, and not "fundamentally fair" due to the unique nature of the road project at issue and the unique importance of an adequate waste site as the paramount factor controlling project costs. That is the evidence that the DOH chose to act upon. The DOH's rationale in this instance was not arbitrary and capricious, but was, to the contrary, logical and consistent with the DOH's statutory and procedural requirements, and the competitive bidding process.

There is not a scintilla of evidence that the rebidding process, based upon the altered project plans, would be unfair. There is no evidence, and the CAWV cites none, to support the CAWV's general language raising the issue of fairness. Since the CAWV fails to specify what it means in this regard, it is at least reasonable to guess that the CAWV is actually seeking an extra measure of what might loosely be termed "fairness" for Heeter Construction, Inc. The Amicus apparently contends that it was not "fair" of the DOH to refuse the bids, and subsequently rebid the project, with project plans altered in an effort to ensure competitive bidding, even where the DOH reasonably believed that Heeter Construction's "entrepreneurship" had nullified the entire purpose of the bidding process. In other words, if a contractor manages to outsmart his competitors, he should also be allowed to outsmart the bidding process and the public interest.

The CAWV states that it adopts CEI's position but, despite its stated concern for general policy issues, the Amicus does not comment on the future effect of that position on general policy relating to takings for public road purposes. The Appellant argues as if the DOH must make a showing of public necessity for the use of the specific property at issue, as a waste site, to

the extent that no other property could possibly serve as a waste site. As noted in the Appellee's Brief, this is the only rationale by which the Appellant's repeated emphasis on the purported availability of other property could be deemed relevant. The Appellant is apparently arguing that the DOH has no real discretion in these matters, and that the DOH must show that the property being taken is the only property that will do under the circumstances. Such a requirement would exceed any previous restriction on the DOH's power of eminent domain and require a reassessment of the intentions of the Legislature in enacting Chapter 17 of the Code.

As is stated more fully in the Appellee's Brief, the DOH acted in accordance with the applicable statutes, in accordance with its existing standards and procedures, and within the discretion granted to it by Chapter 17. It chose to condemn property for use as a waste material site to serve a public road project, and selected what it believed to be the optimum location for that purpose. At most, the Appellee presented evidence supporting the contention that other land might also serve adequately as a waste material site. The Appellee presented no evidence to show that the DOH's actions were arbitrary and capricious. Under existing law, the Appellant failed to carry the burden of proof, and the decision of the Circuit Court was correct.

The Appellant appears to be proposing the adoption of a new and untried standard that would "hold the government's 'feet to the fire'" (Appellant's Brief at 12) and shift the burden of proof to the DOH, effectively leaving the DOH with no discretion. Thus, any property owner, not merely the owner of a "potential waste site", would presumably be able to demand a specific showing of what the Appellant terms "public necessity." This would require that the DOH prove, under some standard, that no other property could serve as well for the contemplated purpose, and that the property at issue was absolutely necessary. If the Amicus has some better understanding of the Appellant's position as a matter of general policy, a detailed explanation

would be helpful to all. Litigation relating to the single parcel of property at issue here delayed the rebidding of the Route 10 project for several months. If the DOH has no discretion in choosing the property needed for public road purposes, the CAWV should be prepared to inform its members that fairness in bidding will soon be a far less frequent concern due to the long delays caused by the new legal complexities stemming from property acquisition.

RELIEF PRAYED FOR

Based upon the foregoing, the Appellee, West Virginia Department of Transportation, Division of Highways, respectfully requests that the Order of the Circuit Court of Logan County be affirmed.

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION
OF HIGHWAYS.

By Counsel

Anthony G. Halkias (WVSB No. 1535)
Robert B. Paul (WVSB No. 6361)
WVDOT, Division of Highways
1900 Kanawha Blvd., East
Building 5, Room A-519
Charleston, WV 25305-0430
(304) 558-2823

Counsel for Appellee

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a West Virginia corporation,

Petitioner,

v. **No.: 072814**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,

Respondent.

CERTIFICATE OF SERVICE

I, Robert B. Paul, counsel for the West Virginia Department of Transportation, Division of Highways, do hereby certify that I have this 7th day of May, 2008, served a true and accurate copy of the foregoing *Response of Appellee, West Virginia Department of Transportation, Division of Highways, to Brief Amicus Curiae* by depositing a copy of the same in the regular U.S. mail, postage prepaid, to the following:

James M. Cagle, Esquire
1200 Boulevard Tower
1018 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 342-3174

Laurie K. Miller, Esquire
Jackson & Kelly, PLLC
Post Office Box 553
Charleston, West Virginia 25301
(304) 340-1000

Robert B. Paul, Esquire
WV State Bar No. 6361
Counsel for WV Department of Transportation, Division of Highways